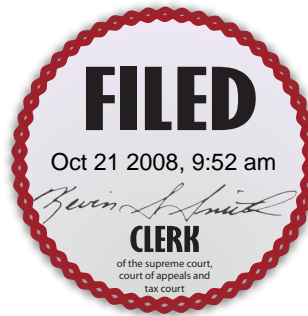


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**MICHAEL R. FISHER**  
Marion County Public Defender Agency  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ZACHARY J. STOCK**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANTOINE WILLIAMS,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-0712-CR-1100

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Carol Orbison, Judge  
Cause No. 49G22-0701-MR-2916

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**October 21, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Antoine Williams (“Williams”) appeals after a jury trial from his convictions of murder,<sup>1</sup> battery,<sup>2</sup> a Class A misdemeanor, and carrying a handgun without a license with a prior conviction,<sup>3</sup> a Class C felony. Williams presents the following restated issues for our review:

- I. Whether the trial court erred by admitting demonstrative evidence by a firearms expert of the use and operation of a firearm similar to the one used in the instant offense.
- II. Whether the trial court erred by refusing a *pro se* motion for discharge under Indiana Criminal Rule 4(B)(1) when Williams was represented by counsel.
- III. Whether there was sufficient evidence to support Williams’s conviction for murder.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

Williams and Eric Munoz (“Munoz”) were members of different motorcycle clubs in Indianapolis, Indiana, and both worked motorcycle club events as disc jockeys. Many motorcycle clubs held New Year’s Eve parties in 2006, and Munoz worked as a disc jockey at one of them. Williams was at that club in the early morning hours of New Year’s Day, January 1, 2007, and loudly and forcefully complained to Munoz about his song selection. Munoz disregarded the comments, and Williams walked away.

Munoz later accompanied two friends to a different club where a party was being held. Williams was working in the disc jockey booth at that party. Williams was spotted at that

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<sup>1</sup> See Ind. Code §35-42-1-1.

<sup>2</sup> See Ind. Code §35-42-2-1(a)(1(A).

club with “glossy” eyes and a “very mean” look. *Tr.* at 69-70. Munoz sat at a table with his friends and either laid his head down or leaned back in his chair, while closing his eyes. Williams approached the table, slapped Munoz in the face three times, and shouted expletives at him to wake him up. Munoz stood and faced Williams, exchanging words. It appeared to others present that the two would fight. Hall, one of Munoz’s friends, intervened and offered Williams a cigarette and a drink from his bottle of Hennessy cognac. Williams accepted the cigarette and the drink and left the room.

Munoz began talking with a member of the motorcycle club. As Williams re-entered the room, he observed Munoz and took issue with Munoz talking with the club member. Williams took the bottle of cognac, which was three-quarters full, from Hall and consumed the remainder. Williams tossed the empty bottle in the trashcan and began arguing with Hall. Hall’s girlfriend intervened, pushing Hall from the room. As Hall and his girlfriend were exiting the room, Williams reached around Hall’s girlfriend and punched Hall in the jaw causing his lip to bleed and his jaw to hurt.

Hall’s girlfriend looked behind her as she continued to push Hall from the room. She observed Munoz and Williams facing each other and exchanging words. Williams was holding a gun in his right hand. People were screaming and trying to exit the room. When Hall and his girlfriend were inside the other room they heard a gunshot and ran out of the club with several other people.

Heather VanBuskirk, one of Munoz’s friends, had come to the club to pick him up.

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<sup>3</sup> See Ind. Code §35-47-2-1; Ind. Code §35-47-2-23(c).

She was sitting nearby when Williams punched Hall. She left the area in a hurry, but looked back and saw Williams and Munoz standing together. VanBuskirk heard a pop, and saw Munoz clutching both of his ears and collapsing. VanBuskirk saw a gun lying on the floor, and watched Williams pick it up. Williams stood over Munoz's body with his hands in the pockets of his sweatshirt before fleeing the club.

An autopsy revealed that Munoz was killed by a bullet that entered at the base of his neck just below his left ear. The bullet damaged several organs, including the heart and lungs before lodging in the lower back just below the waistline. A forensic pathologist testified that the path of the bullet suggested that Munoz was bent at the waist leaning toward Williams, and the soot around the entrance wound suggested that the bullet was fired from a distance of less than three inches. Munoz had blunt force injuries to his head and face that were consistent with being struck by a weapon.

The State charged Williams with murder, battery, and carrying a handgun without a license with a prior conviction. During a pre-trial conference, Williams, who was represented by counsel, personally requested a speedy trial, against the advice of his counsel. The trial court acknowledged Williams's request, noted that the "70TH DAY IS 06/16/07.", and scheduled the trial for June 11, 2007. *Appellant's App.* at 8.

On May 23, 2007, Williams's attorney withdrew the request for a speedy trial and asked for a continuance of the trial date, which the trial court granted. On July 9, 2007, Williams, acting *pro se*, although still represented by counsel, tendered a motion for discharge. On July 17, 2007, the trial court sent Williams a notice that his filing did not comply with the trial rules.

Ultimately, the jury trial began on July 30, 2007 and concluded on August 1, 2007 with the jury finding Williams guilty, and Williams admitting that he had a prior conviction. The trial court sentenced Williams to concurrent sentences of fifty-five years, with ten years suspended, for the murder conviction, one year, for the battery conviction, and one year for the carrying a handgun without a license conviction, for an aggregate sentence of forty-five years.

Williams filed a motion to correct error, which was denied by the trial court after the entry of findings of fact and conclusions of law. Williams now appeals his murder conviction only.

## **DISCUSSION AND DECISION**

### **I. Admissibility of Demonstrative Evidence**

The standard of review for admissibility of evidence issues is whether the trial court's decision amounts to an abuse of discretion. *Allen v. State*, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004). The decision whether to admit evidence will not be reversed absent a showing of manifest abuse of a trial court's discretion resulting in the denial of a fair trial. *Id.* Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. *Id.* In determining whether an evidentiary ruling affected a party's substantial rights, the court assesses the probable impact of the evidence on the trier of fact. *Id.*

Demonstrative evidence is evidence offered for purposes of illumination and clarification. To be admissible, the evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact. *Bennett v. State*,

787 N.E.2d 938, 944 (Ind. Ct. App. 2003). The admissibility of demonstrative evidence must also meet the requirements of Indiana Evidence Rule 403, which balances probative value against prejudicial effect. *Dunlap v. State*, 761 N.E.2d 837, 842 (Ind. 2002). Trial courts are given wide latitude in weighing probative value against the danger of unfair prejudice, and we review that determination for abuse of discretion. *Id.*

Here, the State presented testimony from a firearms expert about the use and operation of a firearm the expert believed to be similar to the weapon used to kill Munoz. The witness used the firearm to further clarify his testimony. The bases for Williams's objection were that the State had not given him proper notice of the use of a similar handgun at trial, and that the use of the handgun would have a prejudicial impact on the jury. The trial court allowed the witness to use the handgun.

#### *A. Allegation of Prosecutorial Misconduct*

First, Williams claims that the deputy prosecutor committed misconduct in the disclosure of the handgun as an exhibit and in representations made regarding the purpose of the exhibit. Our initial inquiry here is whether misconduct was committed, and then whether the misconduct placed the defendant in a position of grave peril. *Donnegan v. State*, 809 N.E.2d 966, 972 (Ind. Ct. App. 2004). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the misconduct. *Id.*

Williams argues that the deputy prosecutor stated that the expert would only use the gun to show how a gun of that type could have caused the lacerations to Munoz's face and head. Williams claims that he agreed not to challenge the expert witness on that point. He

argues now that the prosecutor went beyond the use explained, and engaged the expert in testimony about the function of the handgun.

A review of the record shows that prior to the expert's testimony, the deputy prosecutor explained the use of the handgun as demonstrative evidence as follows:

He has brought the demonstrative gun to court for purposes of . . . explaining . . . its function; but also, more significantly, consistency of certain configuration and measurements on that gun [with] . . . the blunt force trauma on the victim.

*Tr.* at 485. We find that the State did not misrepresent the intended use of the evidence. Williams's counsel asked if the expert was "going to be doing the demonstration on the lacerations," to which the deputy prosecutor responded that the expert "would not be demonstrating anything," but would compare the consistency of the gun measurements to the injury measurements. *Id.* at 486. Williams now claims that those comments misled the defense into thinking that the only demonstration would involve the measurement comparison. However, the deputy prosecutor's comment was a direct response to a limited question by Williams's counsel and not an attempt to deceive. As a result, we find that no prosecutorial misconduct has occurred.

Williams also claims that the evidence should have been excluded because of an alleged discovery violation regarding the handgun. Williams asserts that the State disclosed to the defense that it would be using a firearm as demonstrative evidence less than a week before trial. Williams objected in part on a lack of proper notice. Williams argues that the inadequate notice left him without an opportunity to research whether the handgun was manufactured in different sizes and shapes, and whether the bullet and ammunition recovered

could have been fired by the type of handgun being used by the State as demonstrative evidence. Williams argues that the normal remedy for a discovery violation, a continuance, was not an option, as Williams had insisted on making his own speedy trial request, but that exclusion of the evidence was the most appropriate remedy.

Exclusion of evidence is proper where the State engaged in deliberate conduct or bad faith or where introduction of the evidence would result in substantial prejudice to the defendant's rights. *Cook v. State*, 675 N.E.2d 687, 690 (Ind. 1996). However, Williams has failed to provide evidence of deliberate conduct or bad faith on the part of the State. Williams had been aware of the conclusion that a forty-caliber Highpoint pistol was the murder weapon for months prior to trial. This line of reasoning does not support Williams's argument that the trial court erred by admitting the evidence.

#### *B. Prejudice To Williams*

Williams claims that the trial court abused its discretion by allowing the firearms expert to use a handgun similar to the murder weapon as demonstrative evidence because, he argues, the prejudicial effect outweighed the probative value of the evidence.

In the present case, the jury was informed that the actual murder weapon was never recovered, and that the handgun used by the firearms expert was merely similar to that weapon. However, a bullet and ammunition recovered from the crime scene were recovered, and a demonstration of the basic functioning of a firearm similar to the murder weapon would be helpful to the jury to understand how bullets and casings can be linked to a gun. As in *Dunlap*, 761 N.E.2d at 842, the "potential danger that this exhibit could mislead the jury is low, particularly when considering that the court admonished the jury" that no weapon was



found.

In addition, the prejudice referred to in this particular setting is “unfair” prejudice. *See Williams v. State*, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). “‘Unfair prejudice’ addresses the way in which the jury is expected to respond to the evidence.” *Id.* “It looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence ‘to suggest decision on an improper basis. . . .’” *Id.* (quoting 12 ROBERT LOWELL MILLER, INDIANA PRACTICE §403.102 at 284 (1995) (footnotes omitted)). Here, the probative value of the evidence was sufficient to support the trial court’s decision to admit the evidence, especially with the admonishment to the jury that it was not the actual murder weapon. The trial court did not abuse its discretion in admitting the evidence.

### *C. Harmless Error*

Williams argues that admission of the evidence was not harmless error. He claims that there is insufficient substantial independent evidence of guilt to support the conviction. He concludes that the admission of the handgun evidence had a prejudicial impact on the jury.

Even if the trial court abused its discretion in admitting evidence, we will not reverse a conviction if the error is harmless. *Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004). “Harmlessness is ultimately a question of the likely impact of the evidence on the jury.” *Littler v. State*, 871 N.E.2d 276, 278 (Ind. 2007).

We find that there was substantial independent evidence of Williams’s guilt, such that any error in the admission of the handgun in evidence was harmless. We will engage in discussion of that independent evidence of Williams’s guilt more fully below in the

sufficiency of the evidence argument.

## **II. Criminal Rule 4**

On April 17, 2007, during a pre-trial conference at which Williams was represented by counsel, Williams personally made a request for a speedy trial. Williams's counsel had advised him against making such a request. The trial court acknowledged Williams's request, noted that the "70TH DAY IS 06/16/07", and scheduled the trial for June 11, 2007. *Appellant's App.* at 8. On May 23, 2007, Williams's counsel filed a motion to continue the jury trial setting, fully explaining the disagreement between lawyer and client regarding preparation for trial. The trial court granted counsel's request for a continuance. On July 9, 2007, Williams personally filed a motion for discharge. On July 17, the trial court sent Williams a notice that his filing did not comply with Indiana Trial Rule 11, more specifically, that it was not signed by Williams's counsel of record. Williams's jury trial began on July 30, 2007. Williams alleges that the trial court erred by denying his motion for discharge.

This court conducts a *de novo* review of the lower court's ruling on Criminal Rule 4 motions. *See Kirby v. State*, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002). The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, Section 12 of the Indiana Constitution. *See Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Criminal Rule 4 help implement this right by establishing time deadlines by which trials must be held. *Id.* The rule expressly requires that a defendant be discharged if not brought to trial within certain prescribed time limits; however, the rule and subsequent interpretations have recognized that court congestion and other exigent circumstances may justify a reasonable delay beyond the seventy-day period. *Id.*

A defendant's right to the speedy trial that he requested can be waived. *Hill v. State*, 773 N.E.2d 336, 342 (Ind. Ct. App. 2002). Here, Williams was represented by counsel, and once counsel was appointed, Williams spoke to the court through counsel. *See Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000). The court is not required to respond to the defendant's objections or motions. *Hill*, 773 N.E.2d at 342. As our Supreme Court has said: "To require the trial court to respond to both Defendant and counsel would effectively create a hybrid representation to which Defendant is not entitled." *Id.* (citing *Underwood*, 722 N.E.2d at 832). Furthermore, Williams's counsel's filing of a motion to continue the June 11, 2007, trial resulted in the waiver of Williams's motion for a speedy trial, as the motion for continuance was a request inconsistent with a speedy trial. *See Nicholson v. State*, 768 N.E.2d 1043, 1047 (Ind. Ct. App. 2002).

Williams's allegation that Article 1, Section 13 of the Indiana Constitution entitles him to the right to be heard both by himself and counsel likewise fails. In *Jenkins v. State*, 809 N.E.2d 361, 368 (Ind. Ct. App. 2004), this court held that "filing the *pro se* motions did not amount to a request to proceed with hybrid representation." Our Supreme Court held in *Sanchez v. State*, 749 N.E.2d 509, 521 (Ind. 2001), that, "the provision 'protects against limitations on a defendant's right . . . to be represented by *either* himself or counsel.'" (emphasis supplied). As a result, the trial court did not err by denying Williams's motion for discharge.

### **III. Sufficiency of the Evidence**

Williams argues that the evidence is insufficient to support his conviction, claiming that there is no specific evidence identifying him as the shooter. When we review a claim

that a conviction is not supported by sufficient evidence establishing the defendant's guilt, we may not reweigh the evidence or question the credibility of witnesses. *Brown v. State*, 827 N.E.2d 149, 151-52 (Ind. Ct. App. 2005). We must affirm a conviction if the finder-of-fact heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. *Id.* at 152. When making this determination, we consider only the evidence, and all reasonable inferences to be drawn from that evidence, favorable to the judgment. *Id.* When a conviction is based on circumstantial evidence, this court will not disturb the verdict if the fact finder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. *Id.*

In order to convict Williams of murder, the State was required to prove that Williams 1) knowingly; 2) killed; 3) another human being. *See* Ind. Code §35-42-1-1. A murder conviction may be based entirely on circumstantial evidence. *See Oldham v. State*, 779 N.E.2d 1162, 1168 (Ind. Ct. App. 2002). Yet, mere presence at the crime scene with the opportunity to commit a crime is not a sufficient basis on which to support a conviction. *Brink v. State*, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005). However, presence at the scene in connection with other circumstances tending to show participation, such as companionship with the one engaged in the crime, and the course of conduct of the defendant before, during, and after the offense, may raise a reasonable inference of guilt. *Id.* Moreover, “[h]ostility is a paradigmatic motive for committing a crime.” *Hicks v. State*, 690 N.E.2d 215, 222 (Ind. 1997)(quoting *United States v. Russell*, 971 F.2d 1098, 1106-07 (4thCir. 1992)).

Here, there was evidence of multiple hostile encounters between Williams and Munoz. There were witnesses who saw Williams and Munoz together seconds before the gunshot was

heard. One of the witnesses saw Williams holding a gun. A witness saw Williams picking up a gun, standing over Munoz's body, moving his hands in his pockets, and eventually fleeing the club. Further, the forensic evidence indicates that Williams was the shooter. The gun was fired from less than three inches away, and Williams was the last person who was seen standing that close to Munoz. All of these circumstances taken as a whole raise a reasonable inference of guilt. The evidence was sufficient to support Williams's conviction of murder.

Affirmed.

VAIDIK, J., and CRONE, J., concur.